

30 (Pages 434 to 437)

<p style="text-align: right;">434</p> <p>1 an AWP that is subject to what I have been</p> <p>2 asked to assume that it has been</p> <p>3 fraudulently inflated.</p> <p>4 Now what you are asking me is</p> <p>5 what is the extent of -- won't -- isn't</p> <p>6 there some importance to the yardsticks,</p> <p>7 and there are, and that is going to be --</p> <p>8 that is going to be a measurer to the</p> <p>9 extent that this impact has revealed</p> <p>10 itself in monetary damages, injury to the</p> <p>11 class members.</p> <p>12 So impact is there, and the</p> <p>13 spread will -- the but-for spread, I will</p> <p>14 come to a conclusion based on a set of</p> <p>15 standard scientific procedures to</p> <p>16 ascertain that yardstick. Your expert</p> <p>17 will perhaps do something similar and come</p> <p>18 to a different conclusion. Impact will be</p> <p>19 there. We may diverge on the extent to</p> <p>20 which the injury occurred, and that will</p> <p>21 then be determined by the work done in</p> <p>22 supporting those yardsticks by your expert</p>	<p style="text-align: right;">436</p> <p>1 paid by all or substantially all members</p> <p>2 of the proposed class consequently will be</p> <p>3 artificially inflated, since their</p> <p>4 reimbursement rates are formulaically</p> <p>5 driven by the AWP."</p> <p>6 That is impact, and that has no</p> <p>7 reference yet to the but for. The but for</p> <p>8 is merely going to allow me to go from</p> <p>9 impact to measuring aggregate damage --</p> <p>10 the size of injury of that impact on the</p> <p>11 AWP of all NDCs sold as alleged, as I have</p> <p>12 been asked to assume.</p> <p>13 So I have -- that has been my</p> <p>14 position from the beginning.</p> <p>15 Q. So you are assuming impact based on your</p> <p>16 assumption that the allegations in the</p> <p>17 Complaint are correct?</p> <p>18 A. No, I am not assuming impact. It follows</p> <p>19 as an implication of the allegations I</p> <p>20 have been asked to assume. If the</p> <p>21 allegations are true and they are proven</p> <p>22 so at trial that the AWP was inflated,</p>
<p style="text-align: right;">435</p> <p>1 and the work done by me.</p> <p>2 Q. So you are saying now that your opinion</p> <p>3 with respect to impact does not depend on</p> <p>4 your expectation yardsticks?</p> <p>5 (Pause.)</p> <p>6 (The witness viewing Hartman</p> <p>7 Exhibit No. 002.)</p> <p>8 MR. SOBOL: May the record</p> <p>9 reflect I didn't give him his report this</p> <p>10 time.</p> <p>11 A. As I state in paragraph 10A of my report,</p> <p>12 pages 6 and 7, that "As a matter of basic</p> <p>13 economics and business practices in these</p> <p>14 markets, in pharmaceutical markets, if the</p> <p>15 allegations are true, the following</p> <p>16 consequences occur," and A, 10A, says, "A</p> <p>17 course of conduct designed to artificially</p> <p>18 inflate the AWP of a given drug will</p> <p>19 artificially inflate the AWP of all units</p> <p>20 of that drug sold."</p> <p>21 Then the last sentence of that</p> <p>22 paragraph says, "The reimbursement rates</p>	<p style="text-align: right;">437</p> <p>1 then I don't assume impact. As a matter</p> <p>2 of the business practices in this</p> <p>3 industry, if AWP is inflated, it affects</p> <p>4 all units of that drug and all contracts</p> <p>5 written subject to that AWP. Impact</p> <p>6 couldn't be clearer.</p> <p>7 Q. But you have also conceded, have you not,</p> <p>8 that it is possible that some class</p> <p>9 members did not suffer any impact?</p> <p>10 MR. SOBOL: Objection.</p> <p>11 A. No. What I have conceded is that impact</p> <p>12 -- all class -- all class members were</p> <p>13 subject to impact. The size of the injury</p> <p>14 flowing from that impact may vary. It may</p> <p>15 not. That is going to be something</p> <p>16 subject to -- that will be addressed in</p> <p>17 the damage analysis and more importantly</p> <p>18 at a claims administration phase. But the</p> <p>19 -- they are all impacted. It is whether</p> <p>20 the size -- what the size of the injury</p> <p>21 flowing from that impact is.</p> <p>22 Q. And what econometric analysis can you</p>

<p style="text-align: right;">438</p> <p>1 point me to in your declaration that</p> <p>2 demonstrates that proposition?</p> <p>3 A. Which proposition now?</p> <p>4 Q. That everybody is impacted, no matter</p> <p>5 what, no matter what they think, no matter</p> <p>6 what they know, no matter what. That's</p> <p>7 what you are telling me; right?</p> <p>8 MR. SOBOL: Objection to the</p> <p>9 form.</p> <p>10 A. The -- let's put it -- let's put it this</p> <p>11 way. If I walk over to the thermostat for</p> <p>12 this room and turn it up 20 degrees, we</p> <p>13 will all be impacted. Now each of us may</p> <p>14 mitigate that. Some of us may be</p> <p>15 delighted by that. Some of us may go</p> <p>16 topless and shirtless, and it will</p> <p>17 mitigate the impact. There can be</p> <p>18 different measures of injury, but we will</p> <p>19 all be impacted.</p> <p>20 Now I have been asked to assume</p> <p>21 that the manufacturers went to the AWP</p> <p>22 thermostat and raised it, and that AWP is</p>	<p style="text-align: right;">440</p> <p>1 MR. SOBOL: Objection.</p> <p>2 Q. -- based on what is stated in the</p> <p>3 Complaint?</p> <p>4 MR. SOBOL: Objection. I also</p> <p>5 instruct the witness not to testify</p> <p>6 regarding confidential settlement</p> <p>7 discussions or materials learned in the</p> <p>8 context of that.</p> <p>9 MR. EDWARDS: I object to that</p> <p>10 objection.</p> <p>11 THE WITNESS: Guys --</p> <p>12 MR. EDWARDS: If you got the</p> <p>13 hint.</p> <p>14 THE WITNESS: It just didn't</p> <p>15 matter. I wasn't planning to.</p> <p>16 A. I have been given, as is standard in any</p> <p>17 situation like this, in any situation of</p> <p>18 class that I have been -- in which I have</p> <p>19 been involved, there are a set of</p> <p>20 allegations, which you take as if proven</p> <p>21 at trial, what are the consequences</p> <p>22 thereof.</p>
<p style="text-align: right;">439</p> <p>1 the basis. That's the definition of the</p> <p>2 class. The reimbursement rates or</p> <p>3 reimbursement regime is driven by AWP.</p> <p>4 And I don't need econometrics to tell me</p> <p>5 that if the allegation is that the AWP's of</p> <p>6 these drugs have been inflated, English --</p> <p>7 it is a matter of English.</p> <p>8 Q. So you are assuming then that the AWP's</p> <p>9 have been inflated?</p> <p>10 A. I have been asked to assume that the --</p> <p>11 that the defendants entered into schemes,</p> <p>12 implemented schemes, to inflate the AWP,</p> <p>13 as described in the declaration.</p> <p>14 Q. You are not going to perform any economic</p> <p>15 analysis to establish that the AWP's are</p> <p>16 inflated?</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 A. The --</p> <p>20 Q. In other words, your sole basis for saying</p> <p>21 that the AWP's have been inflated is your</p> <p>22 assumption --</p>	<p style="text-align: right;">441</p> <p>1 The consequences thereof are as</p> <p>2 I said: the AWP was inflated, and if the</p> <p>3 AWP is inflated, that affects everyone who</p> <p>4 is looking at that AWP or using it. So I</p> <p>5 am not going to try to prove that.</p> <p>6 I have, however, corroborated</p> <p>7 the extent to which that inflation did</p> <p>8 indeed occur by looking at spreads and</p> <p>9 looking at yardsticks, and if I had gone</p> <p>10 to the data that is presented in the</p> <p>11 tables and found that they were all within</p> <p>12 the ranges of the yardsticks, I would have</p> <p>13 had to say to counsel, "These allegations,</p> <p>14 you know, the data is not going to support</p> <p>15 your allegations." But one has to go to</p> <p>16 the data. One has to go to the facts and</p> <p>17 see whether -- what one finds.</p> <p>18 Q. So you have to use the yardsticks then to</p> <p>19 establish from an economic perspective</p> <p>20 that the AWP's have been inflated?</p> <p>21 A. No.</p> <p>22 Q. How do you establish that AWP's are</p>

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<p style="text-align: right;">442</p> <p>1 inflated without reference to the</p> <p>2 expectation yardsticks other than to make</p> <p>3 the assumption that counsel has asked you</p> <p>4 to make?</p> <p>5 A. The assumption -- counsel has alleged a</p> <p>6 conspiracy, and by logic and economic</p> <p>7 principles, it leads to the conclusion of</p> <p>8 impact.</p> <p>9 What I will have to look at is</p> <p>10 whether defendants were sufficiently</p> <p>11 attuned to imposing this scheme on all</p> <p>12 NDCs of all drugs. I will be looking at</p> <p>13 spreads by NDCs or by J codes to see the</p> <p>14 extent to which this scheme led to real</p> <p>15 injury and damages. And so I will be</p> <p>16 looking at economic data. But it will</p> <p>17 measure the quantum of damages and injury</p> <p>18 by NDC or by J code, and it may turn out</p> <p>19 that there are some manufacturers for some</p> <p>20 NDCs they felt were unimportant, and they</p> <p>21 -- they -- they didn't subject those drugs</p> <p>22 -- they were untainted by -- by the</p>	<p style="text-align: right;">444</p> <p>1 paragraph 35, the second paragraph within</p> <p>2 that section, third sentence, which</p> <p>3 states, quote, The spread must be</p> <p>4 increased secretly, because if such</p> <p>5 spreads were understood to exist,</p> <p>6 competitors would behave to eliminate</p> <p>7 them, close quote.</p> <p>8 What did you mean by that?</p> <p>9 A. Well, what I meant by that is let's take a</p> <p>10 particular example. Let's take Lupron.</p> <p>11 The spreads that flowed from that -- from</p> <p>12 that fraudulent behavior as admitted to by</p> <p>13 TAP were well in excess of what Medicare</p> <p>14 believed the relationship was and what</p> <p>15 third-party payers believed the</p> <p>16 relationship was.</p> <p>17 Now the spreads -- the extent to</p> <p>18 which that conspiracy to move market</p> <p>19 share, as discussed in the sentencing</p> <p>20 memorandum, it made very clear some NDCs</p> <p>21 were affected more aggressively by that,</p> <p>22 and the quantum of damages by the NDCs</p>
<p style="text-align: right;">443</p> <p>1 scheme, and the data will demonstrate to</p> <p>2 me the extent that that -- that the scheme</p> <p>3 did not lead to injury on purchases of</p> <p>4 those NDCs.</p> <p>5 Q. In other words, if the but-for spreads are</p> <p>6 equal to or less than the actual spreads,</p> <p>7 you would not have real injury or damages</p> <p>8 as you just used those terms?</p> <p>9 A. I have said as much in my declaration in</p> <p>10 discussing the illustrative examples of</p> <p>11 using the spreads and using the</p> <p>12 yardsticks.</p> <p>13 Q. And you have to determine that on a</p> <p>14 case-by-case basis? Right?</p> <p>15 MR. SOBOL: Objection to the</p> <p>16 form.</p> <p>17 A. I don't know what you mean by case-by-case</p> <p>18 basis.</p> <p>19 Q. Let's look at page 15 of attachment C to</p> <p>20 your declaration.</p> <p>21 (Witness complying.)</p> <p>22 Q. I want to direct your attention to</p>	<p style="text-align: right;">445</p> <p>1 sold to urologists were different than</p> <p>2 those say for pediatric uses and for</p> <p>3 gynecological uses, but one could measure</p> <p>4 that injury by NDC, and when one -- if one</p> <p>5 knew what those spreads really were,</p> <p>6 Medicare finally got wise and started</p> <p>7 toward the Medicare Modernization Act, but</p> <p>8 throughout that sentencing memorandum, it</p> <p>9 is clear that TAP kept telling its</p> <p>10 providers, "Jesus, don't tell anybody</p> <p>11 this, or we won't be able to keep offering</p> <p>12 this to you." That's what the secrecy.</p> <p>13 And so, yes, that's the same.</p> <p>14 That in a nutshell is what was occurring</p> <p>15 if there were discounts being offered to</p> <p>16 retail pharmacies on generic drugs. If a</p> <p>17 third-party payer knew that the AWP for</p> <p>18 the generic drug was 90 cents and the</p> <p>19 manufacturer was selling it to him for</p> <p>20 10 cents and yet they were reimbursing at</p> <p>21 an AWP less 25 cents because the PBM said,</p> <p>22 "It's a generic. We are really going to</p>

<p style="text-align: right;">446</p> <p>1 give you a deal. We are going to move you 2 from AWP less 15 to AWP less 25." If they 3 knew that even at that reimbursement rate 4 ASP was 10 cents, they would have been, 5 "Hey, you're not giving me the -- I'm not 6 seeing the real price of this." 7 And the -- that's the secrecy 8 that existed in -- that was attempted to 9 be maintained. It is certainly in the 10 physician-administered drugs. And that is 11 essentially what is going on in this 12 litigation against PBMs now for sharing 13 the discounts, because they are hidden in 14 certain ways, or rebates, because they are 15 hidden as administrative fees rather than 16 rebates. 17 The allegations are all -- that 18 there are -- there is a veil of what is 19 understood, and there is a nontransparency 20 that is finally -- that people are finally 21 becoming aware of, so that what has been 22 secret will be -- will not be secret or</p>	<p style="text-align: right;">448</p> <p>1 and the injunctive relief and the plea 2 agreements have been entered. 3 Q. Well, you say -- 4 A. The -- we are now getting in as part of 5 this litigation, we will be dealing with 6 the -- with the branded drugs that are 7 through which there are price offsets to 8 the PBMs, and it is not clear how they are 9 shared with their -- with their insured 10 life members, and with the discounts 11 offered to retail chains or retailers for 12 generic drugs. 13 Q. You said, "The spread must be increased 14 secretly, because if such spreads were 15 understood to exist, competitors would 16 behave to eliminate them." 17 What do you mean by "such 18 spreads" in the non-Medicare Part B 19 context? Are you talking about spreads in 20 excess of the expectation yardstick? 21 A. If we go to table 3B, where I had not been 22 able at the time of putting this</p>
<p style="text-align: right;">447</p> <p>1 will be less secret such that the 2 discounts, as in a competitive market, 3 will end up being passed on to the 4 third-party payers in ways that they have 5 not as a result of this AWP scheme. 6 Q. It is interesting that you used a Medicare 7 Part B example to explain this sentence. 8 Is this sentence related only to Medicare 9 Part B? 10 MR. SOBOL: Objection to the 11 form. 12 A. I think I mentioned both rebates on the 13 part of PBMs, which are branded single- 14 source drugs for which rebates are paid in 15 that answer, and I also talked about 16 generics through retail pharmacies. So I 17 didn't -- I -- the evidence that has been 18 put -- that is publicly available is -- to 19 date focuses and reveals the incentives 20 and the incentives for the veil in order 21 to keep the incentives to move market 22 share because that's where the litigation</p>	<p style="text-align: right;">449</p> <p>1 declaration together, had received data 2 from Schering-Plough in order to calculate 3 ASP; however, I did have data on the AMP 4 that they report to CMS for their 5 reporting practices -- 6 Q. Can't you just answer my question? 7 A. I am, in the fullness of the factual 8 setting. 9 There are spreads here on the -- 10 if -- if a third-party payer knew that the 11 spreads -- 12 Q. All I am asking you -- I am sorry to 13 interrupt, Dr. Hartman. 14 A. No. You are asking me where is the 15 pressure going to come from. 16 Q. No, no, no. I am asking you to define the 17 term "such spreads." 18 A. Okay. Thank you. Such -- 19 Q. Are -- 20 A. Let me. 21 Q. In the non-Part B context, am I correct in 22 understanding that the phrase, quote, such</p>

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<p style="text-align: right;">450</p> <p>1 spreads, close quote, refers to spreads in</p> <p>2 excess of your expectation benchmark?</p> <p>3 MR. SOBOL: Objection to the</p> <p>4 form.</p> <p>5 A. As in table B, it refers to spreads such</p> <p>6 as we see on a generic drug sold at retail</p> <p>7 that is a non-Medicare Part B drug that is</p> <p>8 well in excess of what the third-party</p> <p>9 payers understood or expected those</p> <p>10 spreads to be. That if third-party payers</p> <p>11 knew that the spreads were that much, that</p> <p>12 ASP was that much below AWP, they would</p> <p>13 say, "Listen, I'm moving elsewhere with my</p> <p>14 purchases unless there is some sharing of</p> <p>15 this."</p> <p>16 Q. Well, you say competitors would behave to</p> <p>17 eliminate them. How would competitors</p> <p>18 behave to eliminate them?</p> <p>19 A. We're seeing it right now with Fortune 500</p> <p>20 companies that are attempting at a larger</p> <p>21 scale than I understand has occurred in</p> <p>22 the past to develop PBMs for their most --</p>	<p style="text-align: right;">452</p> <p>1 couple of minutes for a comfort break and</p> <p>2 then come back and do a segment before</p> <p>3 lunch?</p> <p>4 (Recess taken at 12:21 p.m.)</p> <p>5 (Recess ended at 12:32 p.m.)</p> <p>6 BY MR. EDWARDS:</p> <p>7 Q. Dr. Hartman, I want to talk to you a</p> <p>8 little bit about PBM rebates and direct</p> <p>9 your attention to paragraph 30D of your</p> <p>10 declaration at page 22.</p> <p>11 (Witness complying.)</p> <p>12 A. To 30D, you said? Okay. In the report,</p> <p>13 page 22.</p> <p>14 Q. Paragraph 30D?</p> <p>15 A. Yes.</p> <p>16 Q. You say in the last sentence, "Review of</p> <p>17 PBM contracts in discovery materials</p> <p>18 produced to date suggest that such rebates</p> <p>19 may not be shared with TPPs."</p> <p>20 TPP is third-party payer?</p> <p>21 A. That's correct.</p> <p>22 Q. What is the basis for that statement?</p>
<p style="text-align: right;">451</p> <p>1 their 50 most reimbursed drugs. We're</p> <p>2 seeing it in litigation on the part of</p> <p>3 states saying we're not getting all of the</p> <p>4 spread that is out there. And in that</p> <p>5 article that -- from Forbes Magazine about</p> <p>6 Drug Barron, and I guess that was also the</p> <p>7 article that reported on the litigation of</p> <p>8 ESI, there is an understanding of these</p> <p>9 large spreads on the generic drugs, and</p> <p>10 the -- the moves toward competitive</p> <p>11 changes are going to occur slowly. These</p> <p>12 things are not like a Chicago school,</p> <p>13 perfect competition, everything readjusts.</p> <p>14 (The witness snapping his fingers.) There</p> <p>15 is going to have to be pressures to move</p> <p>16 to other institutional entities. They're</p> <p>17 talking about new PBMs or new PBM programs</p> <p>18 that are purely price transparent. Those</p> <p>19 are the kinds of competitive pressures</p> <p>20 that are occurring outside of the Medicare</p> <p>21 Part B world.</p> <p>22 MR. EDWARDS: Can we take a</p>	<p style="text-align: right;">453</p> <p>1 A. The basis for that statement -- and you</p> <p>2 will notice that I say "suggests" -- I</p> <p>3 haven't come to my final conclusion in</p> <p>4 this illustrative discussion of yardsticks</p> <p>5 -- but I think the basis is what you have</p> <p>6 already very conveniently put out for</p> <p>7 me -- let me just check -- as the ESI</p> <p>8 contracts, Bates numbers 2066 to 2077,</p> <p>9 Exhibit 11.</p> <p>10 And on page 2070 thereof, there</p> <p>11 is language in the contract after having</p> <p>12 introduced the pricing formulations under</p> <p>13 different benefit plans and the</p> <p>14 percentages off of AWP to be negotiated</p> <p>15 and MRA, usual and customary, they talk</p> <p>16 about some formulary management, and then</p> <p>17 they get down to miscellaneous pricing,</p> <p>18 and then they say, "Notwithstanding the</p> <p>19 preceding pricing, certain injectable,</p> <p>20 biotech and compounded drugs," and then it</p> <p>21 lists two, "are priced separately as</p> <p>22 detailed on pages X and X of this proposal</p>

<p style="text-align: right;">454</p> <p>1 due to the specialized manufacturer</p> <p>2 processes, limited or extraordinarily</p> <p>3 dispensing and/or shipping requirements.</p> <p>4 Rebates, if applicable, are retained by</p> <p>5 Express Scripts."</p> <p>6 Q. To what extent does your opinion in this</p> <p>7 case depend on the sentence that appears</p> <p>8 in your report that such rebates may not</p> <p>9 be shared with TPPs?</p> <p>10 MR. SOBOL: Objection to form.</p> <p>11 A. The -- my -- the -- the formulaic</p> <p>12 methodologies put forward in my</p> <p>13 declaration takes the ASPs as they were</p> <p>14 during the period of time and takes the --</p> <p>15 takes a contract that would be of this</p> <p>16 nature, where the rebates are not being --</p> <p>17 are not being shared, and would</p> <p>18 essentially calculate whatever the AWP is,</p> <p>19 and then focus on the overcharges related</p> <p>20 to the AWP inflation, and, whether the</p> <p>21 rebates were retained or not, the -- the</p> <p>22 issue is calculating the, what the but-for</p>	<p style="text-align: right;">456</p> <p>1 BY MR. EDWARDS:</p> <p>2 Q. Dr. Hartman, before the break, we were</p> <p>3 talking about the sentence that appears in</p> <p>4 paragraph 30D of your report that states,</p> <p>5 quote, "Review of PBM contracts in</p> <p>6 discovery materials produced to date</p> <p>7 suggest that such rebates may not be</p> <p>8 shared with TPPs," and I take it from your</p> <p>9 answer to the last question your report</p> <p>10 does not depend on the accuracy of that</p> <p>11 sentence?</p> <p>12 MR. SOBOL: Objection.</p> <p>13 A. Does not depend on the accuracy of that</p> <p>14 sentence?</p> <p>15 Q. For your opinion?</p> <p>16 A. What I have said here, this -- this</p> <p>17 sentence appears in my opinion. I stand</p> <p>18 by it. And it is part of my -- my report,</p> <p>19 my declaration.</p> <p>20 Q. And if that sentence is incorrect, what</p> <p>21 impact does that have on your conclusions?</p> <p>22 A. If this -- if this impact -- if this -- I</p>
<p style="text-align: right;">455</p> <p>1 AWP would be relative to a -- the ASP.</p> <p>2 MR. SOBOL: Excuse me. I am</p> <p>3 sorry. I have to take a break. Hopefully</p> <p>4 it will be a couple of minutes.</p> <p>5 MR. EDWARDS: Any time, Tom.</p> <p>6 MR. SOBOL: Or we can take 45</p> <p>7 minutes for lunch.</p> <p>8 (Discussion off the record,</p> <p>9 followed by luncheon recess taken at</p> <p>10 12:37 p.m.)</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19 AFTERNOON SESSION</p> <p>20 1:24 P.M.</p> <p>21 CONTINUED DIRECT EXAMINATION OF</p> <p>22 DR. HARTMAN</p>	<p style="text-align: right;">457</p> <p>1 am sorry -- if this sentence is incorrect,</p> <p>2 the relationship -- what I am going to</p> <p>3 understand about the relationship of ASP</p> <p>4 and AWP is untouched by whether this turns</p> <p>5 out to be true or not. I will ascertain</p> <p>6 whether this is the case by looking at</p> <p>7 these contracts and being able to depose</p> <p>8 people to see what precisely this sentence</p> <p>9 means. The -- you know, as I say, it is</p> <p>10 talking about what it defines to be</p> <p>11 rebates. It is defining them in terms of</p> <p>12 extraordinary dispensing or shipping</p> <p>13 requirements almost as if they are costs.</p> <p>14 I need to understand a little</p> <p>15 bit more about what this is saying, but</p> <p>16 what I am saying is that for some drugs, I</p> <p>17 have used a percentage that -- of rebates</p> <p>18 that have come from oral drugs, and to the</p> <p>19 extent that that is useful in and relevant</p> <p>20 in for physician-administered drugs, I</p> <p>21 need more discovery information to clarify</p> <p>22 that.</p>

36 (Pages 458 to 461)

<p style="text-align: right;">458</p> <p>1 Q. In other words, rebates count against the</p> <p>2 defendants irrespective of whether they</p> <p>3 are shared by the PBMs with class members?</p> <p>4 A. Well, whether they are shared by PBMs with</p> <p>5 class members is a contractual matter</p> <p>6 between the PBMs and the class members and</p> <p>7 what they had agreed on and whether that</p> <p>8 had been violated or not.</p> <p>9 What is important -- the focus</p> <p>10 of what I have been asked to do is to look</p> <p>11 at reimbursement in a reimbursement regime</p> <p>12 related to AWP and relate that to ASP</p> <p>13 whereas ASP has been influenced by a whole</p> <p>14 variety of rebates and discounts and price</p> <p>15 offsets, all of which are netted off of</p> <p>16 the gross invoice amount, to get ASP. And</p> <p>17 so my whole approach here given the</p> <p>18 allegations have been to focus on</p> <p>19 reimbursements and what AWP would have</p> <p>20 been in the but-for world given what ASP</p> <p>21 was, that is, what manufacturers were</p> <p>22 willing to be paid to sell their product.</p>	<p style="text-align: right;">460</p> <p>1 pays a rebate, then the ASP will go</p> <p>2 down?</p> <p>3 A. When a manufacturer offers any type of</p> <p>4 price offset, it lowers the average ASP</p> <p>5 for that manufacturer.</p> <p>6 MR. EDWARDS: We have to dial</p> <p>7 these people in. I am sorry.</p> <p>8 (Pause.)</p> <p>9 BY MR. EDWARDS:</p> <p>10 Q. What other price offsets in addition to</p> <p>11 rebates go into the calculation of ASP in</p> <p>12 your methodology?</p> <p>13 A. Whatever the manufacturers report as</p> <p>14 debits against gross revenues, selling</p> <p>15 expenses, whatever they have to do to sell</p> <p>16 the product, to market the product, to</p> <p>17 move market share, those are selling</p> <p>18 expenses that as a matter of economics net</p> <p>19 out to a measure of what the net unit</p> <p>20 revenue is on a unit on the product sold.</p> <p>21 Q. So you would include the salaries of</p> <p>22 salespeople in your calculation of ASP?</p>
<p style="text-align: right;">459</p> <p>1 Q. In other words, for every dollar of</p> <p>2 rebates that the manufacturers pay to</p> <p>3 PBMs, there will be an additional dollar</p> <p>4 in damages even if the PBM passes that</p> <p>5 rebate on to the class member?</p> <p>6 MR. SOBOL: Objection.</p> <p>7 A. No.</p> <p>8 Q. What is wrong with my statement?</p> <p>9 MR. SOBOL: Objection.</p> <p>10 A. The -- my -- the damage methodology here</p> <p>11 is not determined -- the overcharge is not</p> <p>12 determined by the dollars of rebates paid</p> <p>13 or the dollars less that ASP is. It is</p> <p>14 determined by what the AWP would have been</p> <p>15 given what manufacturers were willing to</p> <p>16 sell their product for, and that's all the</p> <p>17 dollars they received minus all the other</p> <p>18 stuff that they use to incentivize the</p> <p>19 people to move their product.</p> <p>20 Q. What you are saying is that rebates go</p> <p>21 into the calculation of the ASP, and to</p> <p>22 the extent that a manufacturer offers or</p>	<p style="text-align: right;">461</p> <p>1 A. It would depend. I would want to see how</p> <p>2 it was treated by the manufacturers, but</p> <p>3 in general, I would think not.</p> <p>4 Q. What specific items would you include in</p> <p>5 your calculation of ASP?</p> <p>6 MR. EDWARDS: Or strike that.</p> <p>7 Q. Why don't you explain to me your</p> <p>8 methodology for calculating ASP in this</p> <p>9 case.</p> <p>10 A. Well, the --</p> <p>11 MR. SOBOL: Well, objection to</p> <p>12 form.</p> <p>13 Go ahead.</p> <p>14 A. The method will differ by the drug and by</p> <p>15 the manufacturer. For example, let's take</p> <p>16 TAP Pharmaceutical. TAP was, in terms of</p> <p>17 coming up with the average sales price,</p> <p>18 one could look at their invoice data and</p> <p>19 see what the gross invoice amount was.</p> <p>20 There were line items in their invoice</p> <p>21 database that listed all types of</p> <p>22 discounts, early pay discounts, just</p>

<p style="text-align: right;">462</p> <p>1 general discounts, a variety of credits. 2 I don't know if there were chargebacks in 3 that matter, but you will usually find 4 that, in an invoice database, you will 5 find all the debits that they treat as 6 debits off of the revenue that they earn 7 on the gross invoice amount. 8 Now separately there is -- 9 companies normally keep a rebate database 10 that relates to amount of rebates paid 11 relating to amounts of product sold, and I 12 have found can be allocable -- allocable, 13 that's the right word -- to the products 14 sold and are based on the volume of those 15 products sold as kept track of by the 16 manufacturer. 17 In a matter such as Lupron, 18 there were additional payments where you, 19 when we were talking about could we take 20 into account sales, sales force payments, 21 there were line item accounting 22 expenditures there related to certain</p>	<p style="text-align: right;">464</p> <p>1 then there is a rebate database that in 2 many cases allocates the total rebates -- 3 rebate payments paid to different entities 4 by the -- by product, and so that would be 5 the data that I would look at to use. 6 So I would -- each company may 7 report that differently. They may call 8 one thing a discount that somebody else 9 might have a different name for. It will 10 be driven by what data, how they keep 11 their data, and what I learn in the 12 30(b)(6) depositions about how they keep 13 their data. 14 Q. Is there any authority you can cite that 15 would support your methodology for 16 calculating ASPs? 17 A. I would say that the way I have calculated 18 ASPs is as I have, in the work that I have 19 done in the pharmaceutical industry, 20 mirrors identically the way that the 21 company thinks of ASP. 22 Q. Which company?</p>
<p style="text-align: right;">463</p> <p>1 kinds of consulting expenses, and there 2 were irregular accounting amounts that 3 appeared in their accounting data which 4 seemed to mirror the kinds of payments to 5 which could have been sales payments of 6 some sort to oncologists and oncology 7 groups and the kinds of junkets and off 8 invoice and nonrebate payments that are 9 described in detail in the sentencing 10 memorandum. 11 Now all of those are types of 12 payments that as a matter of economics 13 would be taken as some kind of incentive 14 off of the gross price to incentivize the 15 market to purchase that product. So one 16 would include those and allocate those to 17 the units sold. 18 In some -- looking at in Hatch- 19 Waxman matters where it is a branded drug 20 or a generic drug, it is usually simpler, 21 in that the invoice database has -- keeps 22 track of all of the price offsets, and</p>	<p style="text-align: right;">465</p> <p>1 A. Oh, I don't know which. You can look at 2 the drugs I have worked on in my -- in my 3 CV and begin to guess. 4 Q. How many ASPs are you going to have to 5 calculate here? 6 A. I would calculate ASPs for all NDCs of all 7 drugs subject to the Complaint. 8 Q. Do you know how many that is? 9 A. It is, given the -- given the fact that we 10 live in an age of computers, it is 11 irrelevant. It could be a thousand. It 12 is something that you turn the machine on. 13 At the end of the day, you have got them 14 all by NDC by quarter, by month, depending 15 on the data that we get. 16 Q. Going back to the sentence in 17 paragraph 30D of your declaration that 18 "review of PBM contracts in discovery 19 materials produced to date suggests that 20 such rebates may not be shared with TPPs," 21 your support for that is what we have 22 marked as Exhibit 11? Is that correct?</p>

38 (Pages 466 to 469)

<p style="text-align: right;">466</p> <p>1 A. That is correct.</p> <p>2 Q. And Exhibit 11, for the record, is a</p> <p>3 pharmacy benefit proposal -- I am sorry --</p> <p>4 Pharmacy Benefit Program Pricing Proposal</p> <p>5 from Express Scripts, Bates numbered</p> <p>6 ESI 277 2066 through 2077, and the</p> <p>7 particular page that you have reference to</p> <p>8 in footnote 47 of your declaration as</p> <p>9 supporting the statement made in paragraph</p> <p>10 30D is page 2070. Is that correct?</p> <p>11 A. That is correct, as it states in my</p> <p>12 footnote 47.</p> <p>13 Q. And that page talks about certain</p> <p>14 injectable, biotech, and compounded drugs.</p> <p>15 Correct?</p> <p>16 A. That's correct.</p> <p>17 Q. And if you turn to the very next page, it</p> <p>18 describes two options under which rebates</p> <p>19 would be shared with the customer. Isn't</p> <p>20 that true?</p> <p>21 (Pause.)</p> <p>22 (The witness viewing Hartman</p>	<p style="text-align: right;">468</p> <p>1 see whether it was similar to ones that I</p> <p>2 have seen.</p> <p>3 Q. Take a look at page 2838 of this document.</p> <p>4 (Witness complying.)</p> <p>5 Q. That page sets forth a provision whereby</p> <p>6 the rebate would be shared with the</p> <p>7 customer? Is that correct?</p> <p>8 MR. SOBOL: Which subparagraph</p> <p>9 would that be, Steve?</p> <p>10 MR. EDWARDS: The entire page.</p> <p>11 Page 2838 of Exhibit 12.</p> <p>12 (Pause.)</p> <p>13 (The witness viewing Hartman</p> <p>14 Exhibit No. 012.)</p> <p>15 Q. Do you have this in front of you?</p> <p>16 A. Yes, I do. I am reading the various</p> <p>17 paragraphs and what they're saying about</p> <p>18 the issue at large.</p> <p>19 (Further pause.)</p> <p>20 (The witness continues to view</p> <p>21 Hartman Exhibit No. 012.)</p> <p>22 A. Okay.</p>
<p style="text-align: right;">467</p> <p>1 Exhibit No. 011.)</p> <p>2 A. That is true.</p> <p>3 Q. Take a look at --</p> <p>4 MR. SOBOL: Could we go off?</p> <p>5 Q. -- the document we marked as --</p> <p>6 MR. SOBOL: Before you -- off</p> <p>7 the record.</p> <p>8 (Discussion off the record.)</p> <p>9 MR. EDWARDS: Back on the</p> <p>10 record.</p> <p>11 BY MR. EDWARDS:</p> <p>12 Q. Take a look at what we have marked as</p> <p>13 Exhibit 12, which is a Caremark</p> <p>14 Prescription Benefit Management Agreement,</p> <p>15 Bates stamped CMK-AWP 002818 through 844.</p> <p>16 (Witness complying.)</p> <p>17 Q. Have you ever seen this document before?</p> <p>18 (Pause.)</p> <p>19 (The witness viewing Hartman</p> <p>20 Exhibit No. 012.)</p> <p>21 A. I'm not sure that I have. I have taken a</p> <p>22 little time to, just in case I hadn't, to</p>	<p style="text-align: right;">469</p> <p>1 Q. Can you answer my question?</p> <p>2 A. I don't remember the question now besides</p> <p>3 would you take a look at it, that page.</p> <p>4 Q. Is it correct that the provisions set</p> <p>5 forth on that page relates to sharing the</p> <p>6 debate between the PBM and the customer?</p> <p>7 A. It does.</p> <p>8 Q. Okay. Take a look at Exhibit 13.</p> <p>9 (Witness complying.)</p> <p>10 Q. For the record, this is a document</p> <p>11 entitled AdvancePCS Health L.P., Managed</p> <p>12 Pharmacy Benefit Services Agreement. The</p> <p>13 stamp is CMK-AWP 003724 through 3749.</p> <p>14 Have you reviewed this document</p> <p>15 in connection with your work on this case?</p> <p>16 (Pause.)</p> <p>17 (The witness viewing Hartman</p> <p>18 Exhibit No. 013.)</p> <p>19 A. I have now reviewed it, and I think this</p> <p>20 may have been sent to me, but I don't</p> <p>21 recall reviewing it in any detail.</p> <p>22 Q. Take a look at the page with the Bates</p>

<p style="text-align: right;">470</p> <p>1 number 3747. 2 (Witness complying.) 3 A. Okay. 4 Q. Do you see under the heading "Other fees" 5 in section 1.9 there is an item entitled 6 "AdvancePCS' Rebate Percentage"? 7 A. I do see that. 8 Q. And that percentage amount is not filled 9 in? 10 A. That's correct. 11 Q. That suggests that that is a subject of 12 negotiation between the PBM and the 13 customer? 14 A. Well -- 15 Q. Would that be fair? 16 A. It would -- two things are fair from 17 summarizing these other fees, and that is, 18 one, that many of the services on which 19 PBMs compete and offer contracts are not 20 based on a bundled price but an unbundled 21 price per service performed under the 22 other fees; and the second thing would be</p>	<p style="text-align: right;">472</p> <p>1 Section 2 and as set forth in Exhibit B"? 2 A. I do see that. 3 Q. So what this provides is that the customer 4 will get all of the rebates subject to or 5 except for a rebate percentage which 6 AdvancePCS will negotiate with the 7 customer? Is that your understanding? 8 A. Well, my understanding is that a PBM has a 9 number of categories of payments that it 10 receives from manufacturers that are 11 characterized as rebates and 12 administrative fees, and I think there is 13 another category, and I also understand 14 that there is some contention about 15 whether amounts that actually reflect 16 rebates actually get reported as 17 administrative fees. 18 Given that understanding and 19 reading what you have just asked me to 20 look at, what I see as being expressed 21 here is that there is a rebate percentage 22 to be negotiated on page 3747, and so that</p>
<p style="text-align: right;">471</p> <p>1 what you said, that there is a blank by 2 the rebate percentage that would indicate 3 to me that that is something subject to 4 negotiation, and I just want to confirm 5 that interpretation with other parts of 6 the document where I saw rebates 7 mentioned. 8 Q. Yes. Let me see if I can help you. Why 9 don't you turn to Section 1.9D. 10 A. Just where I was turning. 11 Q. Bates number 3728. 12 (Witness complying.) 13 Q. Do you see where it says, quote, Subject 14 to the terms and conditions of this 15 agreement, on behalf of customer, 16 AdvancePCS will receive the rebates paid 17 by manufacturers to customer. Within 60 18 days of the beginning of each calendar 19 quarter, AdvancePCS will remit to customer 20 all rebates received by AdvancePCS during 21 the prior calendar quarter, if any, net of 22 fees retained by AdvancePCS pursuant to</p>	<p style="text-align: right;">473</p> <p>1 there is going to be a line item for 2 manufacturers that is going to be called 3 "rebates" as opposed to "administrative 4 fees" and other things paid to the PBM, 5 and of that percentage of total rebates 6 that have been negotiated to be paid to 7 the third-party payer that is subject to 8 this contract, Section D on page 3748 is 9 saying that within 60 days of the 10 beginning of each calendar quarter 11 AdvancePCS will remit to consumers all 12 rebates. 13 By that, I mean that is the 14 percentage of total rebates received by 15 AdvancePCS, which is a subset of all the 16 payments from the manufacturers, and 17 that's my understanding of those two 18 pages. 19 Q. Well, you mentioned that the PBM might get 20 administrative fees from the manufacturer? 21 Right? 22 A. That's right.</p>

40 (Pages 474 to 477)

<p style="text-align: right;">474</p> <p>1 Q. And there is a disclosure in this contract</p> <p>2 with respect to administrative fees?</p> <p>3 Isn't that true?</p> <p>4 MR. SOBOL: Objection to the</p> <p>5 form.</p> <p>6 Q. Paragraph 1.9F?</p> <p>7 MR. SOBOL: Objection to the</p> <p>8 form.</p> <p>9 A. Oh, how -- how handy.</p> <p>10 (Pause.)</p> <p>11 (The witness viewing Hartman</p> <p>12 Exhibit No. 013.)</p> <p>13 A. There is a disclosure as to administrative</p> <p>14 fees in paragraph 1.9F.</p> <p>15 Q. And the disclosure also states that, "The</p> <p>16 administrative fees will not exceed</p> <p>17 3 percent of the aggregate cost of the</p> <p>18 pharmaceutical products dispensed to the</p> <p>19 members"? Correct?</p> <p>20 A. That's what this contract does indeed say.</p> <p>21 Q. Now if a customer agreeing to this</p> <p>22 contract can negotiate with the PBM over</p>	<p style="text-align: right;">476</p> <p>1 it is my understanding that the reason you</p> <p>2 are finding third-party payer clients</p> <p>3 being unsatisfied with PBMs is precisely</p> <p>4 because they feel they're not getting</p> <p>5 enough audited information to be able to</p> <p>6 ascertain whether what they have agreed to</p> <p>7 here is occurring in reality.</p> <p>8 Q. Well, if there were a right to audit the</p> <p>9 rebate information, would that help</p> <p>10 matters?</p> <p>11 A. I think there is a right to audit rebate</p> <p>12 information.</p> <p>13 Q. Right.</p> <p>14 A. It doesn't seem to have helped matters.</p> <p>15 Q. Well, take a look at paragraph 4.4B on</p> <p>16 page 3733.</p> <p>17 (Witness complying.)</p> <p>18 Q. That provision gives the customer the</p> <p>19 right to audit records directly related to</p> <p>20 rebates; correct?</p> <p>21 A. It does. I can only conclude that this</p> <p>22 paragraph appears in this contract and</p>
<p style="text-align: right;">475</p> <p>1 how much of the rebate it will receive and</p> <p>2 how much of the rebate the PBM will</p> <p>3 receive, how can that customer be injured</p> <p>4 by the alleged fraudulent scheme?</p> <p>5 A. Well, the -- to the extent that all of the</p> <p>6 information described here is transparent</p> <p>7 to the third-party payers, the clients of</p> <p>8 the PBM, that will allow for an informed</p> <p>9 understanding of what -- of some notion of</p> <p>10 the relationship between AWP and what</p> <p>11 their actually -- what their actual</p> <p>12 reimbursement rates are.</p> <p>13 The whole focus of much of the</p> <p>14 litigation that we've talked about in</p> <p>15 other cases has been precisely -- and</p> <p>16 there is academic research that has been</p> <p>17 conducted -- that while these contracts,</p> <p>18 precontractual discussions occur, there is</p> <p>19 opportunity for postcontractual strategic</p> <p>20 behavior on the part of the PBM to either</p> <p>21 hide total rebate dollars, to classify</p> <p>22 rebate dollars as administrative fees, and</p>	<p style="text-align: right;">477</p> <p>1 most likely appears in most contracts of</p> <p>2 PBMs with their clients, and yet I'm</p> <p>3 finding that there are sufficient number</p> <p>4 of clients that have come to believe that</p> <p>5 they do not -- that these rights do not</p> <p>6 give them enough information to be fully</p> <p>7 informed.</p> <p>8 Q. You say you have made some sort of</p> <p>9 finding?</p> <p>10 A. I have said I have observed in articles</p> <p>11 that we've talked about in -- that I have</p> <p>12 cited in my declaration and in the Drug</p> <p>13 Cost Management Report where we're finding</p> <p>14 litigation, even where there is a right to</p> <p>15 audit, where clients of third-party payers</p> <p>16 -- of PBMs are believing in spite of the</p> <p>17 audits that things have been hidden from</p> <p>18 them, or that even in spite of the audits</p> <p>19 dealing with a PBM is not working for</p> <p>20 them; they are going to form their own; or</p> <p>21 they want a form of a PBM that offers a</p> <p>22 product that is a much more transparent</p>

<p style="text-align: right;">478</p> <p>1 product than what these products have</p> <p>2 been.</p> <p>3 Q. So you are saying that if it happens in</p> <p>4 one case it must happen in all cases?</p> <p>5 A. I'm saying that -- I'm saying that there</p> <p>6 -- the allegations in this case are based</p> <p>7 on the fact that there is nontransparency</p> <p>8 between the benchmark prices and ASPs, and</p> <p>9 part of that nontransparency and the</p> <p>10 ability for that fraudulent concealment to</p> <p>11 take place is that incentive payments are</p> <p>12 paid where the ultimate consumer does not</p> <p>13 understand those incentive payments and</p> <p>14 does not understand the degree to which</p> <p>15 discounts off of manufacturer prices are</p> <p>16 offered, and I am saying that that reality</p> <p>17 has begun to show itself in litigation</p> <p>18 from the Lupron matter through other</p> <p>19 matters that we -- that we have cited in</p> <p>20 the popular press.</p> <p>21 Q. You are not saying that all PBM customers</p> <p>22 have sued their PBMs for fraud, are you?</p>	<p style="text-align: right;">480</p> <p>1 the ability to understand -- and that that</p> <p>2 competition, that the differentiation of</p> <p>3 the products and the bundles of services</p> <p>4 that are offered priced by service differ,</p> <p>5 and the contracts are very complex, and</p> <p>6 health plan benefit consultants review</p> <p>7 them, and companies review them, and large</p> <p>8 insurers review them, and there are</p> <p>9 students of this industry that say that in</p> <p>10 spite -- that looking closely at that,</p> <p>11 these contracts are sufficiently complex</p> <p>12 that the possibilities for opportunistic</p> <p>13 behavior on the part of the PBMs once the</p> <p>14 contracts have been entered into, it is</p> <p>15 very difficult to fully audit these</p> <p>16 contracts and to really know whether the</p> <p>17 product that you felt has been a</p> <p>18 competitive product is delivering what you</p> <p>19 thought it would deliver.</p> <p>20 Q. Wouldn't economic theory predict that</p> <p>21 competition among the PBMs would dissipate</p> <p>22 any effects of the alleged AWP fraud?</p>
<p style="text-align: right;">479</p> <p>1 A. No, I don't think I have said that.</p> <p>2 Q. Only some have made that allegation?</p> <p>3 Correct?</p> <p>4 A. I'm -- I've -- I've pointed to examples.</p> <p>5 Q. And some have not?</p> <p>6 A. I -- I would presume so. If you -- if you</p> <p>7 would like to list them, that's fine.</p> <p>8 Q. And the only way to determine which payers</p> <p>9 have been defrauded by their PBMs and</p> <p>10 which payers have not is to take it on a</p> <p>11 payer-by-payer basis? Isn't that true?</p> <p>12 MR. SOBOL: Objection.</p> <p>13 A. No.</p> <p>14 Q. Doesn't the evidence that you have before</p> <p>15 you suggest that the PBMs are competing</p> <p>16 with one another with respect to how much</p> <p>17 of the rebate is going to be passed on to</p> <p>18 the customer?</p> <p>19 A. The evidence put before me is that there</p> <p>20 has been some form of product</p> <p>21 differentiation competition among PBMs</p> <p>22 over the last 10 years, and that the --</p>	<p style="text-align: right;">481</p> <p>1 MR. SOBOL: Objection.</p> <p>2 A. Ah-ha, the Chicago school.</p> <p>3 Competition is a powerful</p> <p>4 motivator. It is a powerful force.</p> <p>5 However, for it to work, there has to be</p> <p>6 sufficient information for the customers</p> <p>7 to be able to understand what -- what are</p> <p>8 the products being offered to them and</p> <p>9 whether they are benefiting therefrom.</p> <p>10 And what is clear, the</p> <p>11 allegations in this case say that the PBMs</p> <p>12 have not been able or that the customers</p> <p>13 have not been able to generate competition</p> <p>14 on the part of the PBMs sufficient to</p> <p>15 defeat the AWP inflation scheme.</p> <p>16 The spreads that I see as I try</p> <p>17 and corroborate those allegations and look</p> <p>18 at the data and illustrate how one would</p> <p>19 go about measuring injury and damages</p> <p>20 demonstrate that while competition does</p> <p>21 work in an area with this complexity, it</p> <p>22 works slowly, and is subject to</p>

42 (Pages 482 to 485)

<p style="text-align: right;">482</p> <p>1 opportunistic behavior of the</p> <p>2 intermediaries.</p> <p>3 Q. I take it you haven't studied at this</p> <p>4 point how competition has worked in this</p> <p>5 area over the time period that is at issue</p> <p>6 in this case?</p> <p>7 MR. SOBOL: Objection.</p> <p>8 Q. Correct?</p> <p>9 A. I don't understand that question.</p> <p>10 Q. Well, you have not studied the level of</p> <p>11 competition that has existed among PBMs</p> <p>12 throughout the class period, have you?</p> <p>13 A. In the consulting that I have performed</p> <p>14 for -- in support of litigation in this</p> <p>15 industry and in declarations that I have</p> <p>16 written and in some academic research</p> <p>17 undertaken, the competitive behavior of</p> <p>18 all entities in this market has been</p> <p>19 subject to scrutiny -- my scrutiny,</p> <p>20 whether -- I have certainly not published</p> <p>21 a paper on the degree to which PBMs are</p> <p>22 sufficiently competitive and sufficiently</p>	<p style="text-align: right;">484</p> <p>1 A. Okay. I have found that footnote and also</p> <p>2 reviewed a bit more of my declaration. So</p> <p>3 your question again was?</p> <p>4 Q. Well, you keep referring to studies and</p> <p>5 literature. The studies and literature</p> <p>6 are Langenfeld and Maness? Right?</p> <p>7 A. Well, Langenfeld and Maness is a paper</p> <p>8 that has been -- is the basis of research</p> <p>9 that has been done on PBM behavior, in</p> <p>10 particular self dealing. The -- certainly</p> <p>11 PBM behavior had been the subject of the</p> <p>12 Levy -- the Levy report for the FTC for</p> <p>13 the Bureau of Economics, so it was a</p> <p>14 different aspect of PBM behavior, that</p> <p>15 also discussed possibilities for</p> <p>16 opportunistic behavior, behavior that</p> <p>17 would redound negatively to the class.</p> <p>18 If you turn to footnote 30 of</p> <p>19 attachment C and actually look a little</p> <p>20 more fully at attachment C, section C.1,</p> <p>21 paragraphs 16 through 26, I examine</p> <p>22 literature and factual evidence regarding</p>
<p style="text-align: right;">483</p> <p>1 subject to the scrutiny of their customers</p> <p>2 so that their customers could make</p> <p>3 informed decisions and switching decisions</p> <p>4 that lead to competitive results.</p> <p>5 Q. You have not prepared a study of</p> <p>6 competition among PBMs in connection with</p> <p>7 this case? Correct?</p> <p>8 A. I have cited the -- what studies have been</p> <p>9 done and what information I have felt is</p> <p>10 relevant.</p> <p>11 Q. And that's the Langenfeld and Maness</p> <p>12 article?</p> <p>13 A. Could you direct me to the page that is</p> <p>14 on?</p> <p>15 Q. I will try, if I can find it. Take a look</p> <p>16 at note 34.</p> <p>17 A. And is that in the main report, or is that</p> <p>18 in an attachment?</p> <p>19 Q. It is in the main report, page 14.</p> <p>20 (Pause.)</p> <p>21 (The witness viewing Hartman</p> <p>22 Exhibit No. 002.)</p>	<p style="text-align: right;">485</p> <p>1 the PBM, the market, or the structure of</p> <p>2 the providers of PBM services, and so that</p> <p>3 is citing things much more than just the</p> <p>4 Levy report or the Langenfeld and Maness</p> <p>5 paper.</p> <p>6 If you turn to footnote 30, the</p> <p>7 Langenfeld and -- and this is again in</p> <p>8 attachment C -- but some of the other</p> <p>9 exhibits of the difficulties of consumers</p> <p>10 feeling that they are able to discipline</p> <p>11 PBMs through competitive bidding, which is</p> <p>12 what you are telling me should have</p> <p>13 occurred, has been cited in the one</p> <p>14 article in the Drug Cost Management Report</p> <p>15 on the coalition of the 50 Fortune 500</p> <p>16 companies.</p> <p>17 There are other selected</p> <p>18 articles from 2004 in the Drug Cost</p> <p>19 Management Report talking about how in</p> <p>20 light of the evidence that has become</p> <p>21 clear to third-party payers there is an</p> <p>22 attempt to better discipline PBMs in ways</p>

<p style="text-align: right;">486</p> <p>1 that were not done during the '90s in the</p> <p>2 major part of the class period and the</p> <p>3 desires for the pricing transparency.</p> <p>4 So the footnotes to that section</p> <p>5 are clearly much more substantial than</p> <p>6 just the Langenfeld and Maness report, and</p> <p>7 all of them are getting at issues that are</p> <p>8 relevant to what we're talking about.</p> <p>9 Q. But for this proposition, you are simply</p> <p>10 relying on articles by others? You</p> <p>11 haven't done any independent analysis of</p> <p>12 your own?</p> <p>13 A. Not to date.</p> <p>14 MR. SOBOL: Objection.</p> <p>15 Q. And are you aware that the Langenfeld and</p> <p>16 Maness article has been refuted in an</p> <p>17 article by Wosinska and Huckman in Health</p> <p>18 Affairs?</p> <p>19 A. Huckman has found that Langenfeld is</p> <p>20 wrong?</p> <p>21 MR. SOBOL: Can we get the</p> <p>22 spelling of these people?</p>	<p style="text-align: right;">488</p> <p>1 subject to ongoing empirical analysis,"</p> <p>2 and I am aware of the fact that this</p> <p>3 particular aspect of opportunistic</p> <p>4 behavior, the papers that I understand are</p> <p>5 following the Langenfeld and Maness paper,</p> <p>6 do not have to do with structural issues</p> <p>7 about PBMs, competitiveness generally.</p> <p>8 They have to do with two major conclusions</p> <p>9 here: whether there is a shift to generic</p> <p>10 substitution that is more aggressive by</p> <p>11 PBMs with their own mail order pharmacy</p> <p>12 relative to those that are not; and also</p> <p>13 substitution toward other unit dose</p> <p>14 versions, NDCs, of particular drugs.</p> <p>15 And so it is a limited paper as</p> <p>16 to what the opportunistic behavior is, and</p> <p>17 I'm not -- I would have to look at what</p> <p>18 Huckman and his colleague have written to</p> <p>19 judge the efficacy of their findings and</p> <p>20 to put that in the context of many more</p> <p>21 articles and insights and discussions of</p> <p>22 this industry and this group of entities</p>
<p style="text-align: right;">487</p> <p>1 MR. EDWARDS: H-U-C-K-M-A-N.</p> <p>2 Q. You don't believe it; right?</p> <p>3 A. No, no. I --</p> <p>4 Q. I mean if Huckman thinks Langenfeld is</p> <p>5 wrong, he must be wrong?</p> <p>6 A. Yes. Huckman is a main man.</p> <p>7 Q. Okay.</p> <p>8 MR. SOBOL: Well --</p> <p>9 THE WITNESS: This is --</p> <p>10 MR. SOBOL: No.</p> <p>11 THE WITNESS: This is playful.</p> <p>12 That -- that was all playful.</p> <p>13 MR. SOBOL: Well, I want -- all</p> <p>14 right.</p> <p>15 THE WITNESS: Please.</p> <p>16 A. I would have to review Messrs. John Doe</p> <p>17 and Huckman -- I don't remember the first</p> <p>18 name. You will notice in footnote 25 on</p> <p>19 page 9 of attachment C where I mention</p> <p>20 again the Langenfeld and Maness paper. I</p> <p>21 put a sentence at the end of that, "It</p> <p>22 should be noted that these conclusions are</p>	<p style="text-align: right;">489</p> <p>1 within this industry than a dispute</p> <p>2 between Langenfeld and Maness and Huckman</p> <p>3 et al.</p> <p>4 Q. What role do benefit consultants play in</p> <p>5 relationships between class members and</p> <p>6 PBMs?</p> <p>7 MR. SOBOL: Objection.</p> <p>8 You may answer.</p> <p>9 A. It is my understanding that benefit</p> <p>10 consultants help third-party payers</p> <p>11 understand the -- to try and make</p> <p>12 transparent the less-than-transparent</p> <p>13 contracts being offered by PBMs to the</p> <p>14 third-party payers.</p> <p>15 Q. So if a benefit consultant understood the</p> <p>16 relationship between the reported AWP's and</p> <p>17 ASPs, that would vitiate any effects of</p> <p>18 the alleged fraud? Correct?</p> <p>19 MR. SOBOL: Objection.</p> <p>20 A. The effects of the fraud would be vitiated</p> <p>21 if the actual spreads equaled or came</p> <p>22 within the but-for ranges, and since</p>

44 (Pages 490 to 493)

<p style="text-align: right;">490</p> <p>1 benefit consultants exist and have 2 existed, my observations of the spreads 3 are that they have not been able to 4 effectively communicate everything that is 5 necessary to vitiate the effects of that 6 fraud. 7 Q. Well, what if a benefit consultant 8 testifies that they knew exactly what the 9 spread was; they knew what the reported 10 AWP was; they knew what the ASP was; and 11 they went out and got the best deal they 12 could -- 13 A. Can I -- 14 Q. -- for their client. 15 A. Can I clarify? Can I ask a question about 16 your question? 17 Q. Sure. 18 A. Because you said "the spread." Do you 19 mean the spread on every NDC for every 20 drug? Or when you say "the spread," what 21 does that mean? 22 Q. Yes, yes.</p>	<p style="text-align: right;">492</p> <p>1 there must be injury irrespective of what 2 anybody knew? 3 MR. SOBOL: Objection. 4 You may answer. 5 Q. Is that what you are saying? 6 MR. SOBOL: Objection. 7 You may answer. 8 A. I am saying that as long as the but-for -- 9 the actual spreads exceeded the yardsticks 10 by the orders of magnitude that I have 11 illustrated occurred for generics and 12 physician-administered drugs, that the 13 market as a whole, that the PBMs, even if 14 there was a shining light, one point of 15 light, one benefit consultant that knew it 16 all and said, "This is what you've got to 17 negotiate," they would have to get some 18 PBM to agree to that, and I don't think 19 you have -- you have -- you have 20 stipulated or you have hypothesized the 21 existence of such a person. I don't think 22 there is such a person. But should there</p>
<p style="text-align: right;">491</p> <p>1 A. So you mean they knew everything about 2 every drug; they knew what the AWP was; 3 they knew the ASP by NDC for every drug? 4 Q. Right. 5 A. Okay. 6 Q. And they went out and negotiated the best 7 deal they could for their customer. Would 8 you agree that that particular class 9 member would not be injured by the fraud? 10 MR. SOBOL: Objection. 11 A. No. 12 Q. Why not? 13 A. Well, in order for them to be not injured 14 by the fraud, the result of that 15 negotiation would have to lead to a PBM 16 being willing to offer a contract that was 17 that transparent, and I know of no PBM 18 that has done so in the past. That the 19 PBMs have a lot of who we are in this -- 20 in this -- in this bargaining situation. 21 Q. What you are saying is so long as the 22 actual spread exceeds the but-for spread</p>	<p style="text-align: right;">493</p> <p>1 have been such a person, they would need 2 more than just that information. 3 They would need to be able to 4 involve enough customers or their 5 customers such that in the negotiations 6 with the PBM they could go to that line on 7 that contract page and write down the 8 percentage and that PBM would agree to it 9 such that it reflected all of that 10 information by NDC, and that is -- the 11 fact that that has not happened is clear 12 by the simple illustrative spreads that I 13 have already pulled together, and it will 14 become clearer when I get the full data 15 from the manufacturers. 16 Q. Have you considered whether there could be 17 another explanation for why a spread, an 18 actual spread, would exceed the but-for 19 spread -- 20 MR. SOBOL: Objection. 21 Q. -- other than fraud? 22 MR. SOBOL: Objection.</p>

<p style="text-align: right;">494</p> <p>1 A. There could be possibilities. However, 2 those possibilities -- that is why there 3 is not a single but-for -- a single 4 yardstick. There are variations in those 5 yardsticks and those spreads which reflect 6 things other than fraud. You will get 7 some differentiation other than pricing 8 for clinical attributes, but that's -- 9 that leads to a range in the but-for in 10 the yardstick spreads. 11 Q. You are not in a position to eliminate 12 those other possibilities at this point? 13 MR. SOBOL: Objection. 14 A. At this point, I have been asked to 15 indicate how I would develop yardsticks 16 that by taking the upper bound of those 17 yardsticks would allow for the greatest 18 desirability in the product or the 19 clinical attributes of that product or the 20 competitive -- relative competitive 21 attributes of that product. 22 For example, the spreads that I</p>	<p style="text-align: right;">496</p> <p>1 what the ASP for a particular drug was 2 they would be able to negotiate a greater 3 share of the rebates from the PBMs? 4 MR. SOBOL: Objection. You may 5 answer. 6 A. I am saying that if -- if I am Cigna and 7 I'm negotiating with my -- well, I have my 8 PBM, so let's get one with an arm's 9 length. 10 I am some third-party payer. I 11 am Blue Cross/Blue Shield in some state, 12 and I am negotiating with my PBM, and 13 we're talking about percentages of 14 rebates, and we're talking about this and 15 that, and we're talking about whether when 16 a generic is available do I go to AWP 17 minus 20 percent from AWP minus 30 percent 18 for the branded drug, and if in that 19 conversation the third-party payer -- and 20 -- and the PBM is saying, you know, we are 21 going to keep it at 13 percent, 22 17 percent, and here is the AWP, it is</p>
<p style="text-align: right;">495</p> <p>1 talk about on page 24 for single-source 2 brand name drugs range from 16 to 33 3 percent. As I do my more complete damage 4 analysis, I will refine that spread -- the 5 spread of the yardsticks, and the -- there 6 is -- what this is saying is that there 7 could be some brand name drugs whose 8 spreads are 16 percent and some that are 9 twice that. 10 Well, a spread that is at the 11 upper end of that range no doubt has other 12 competitive advantages that allows for -- 13 that could allow for higher prices, the -- 14 or could allow for lower -- could affect 15 what that spread is. It could go either 16 way. 17 And I'm going to -- I am 18 allowing, as I -- in any of the 19 calculations I have done, I have taken the 20 upper range of that spread to be 21 conservative of the but-for spreads. 22 Q. Are you saying that if class members knew</p>	<p style="text-align: right;">497</p> <p>1 like a buck, and so you are going to be 2 paying, you know, maybe 80 to 87 cents, 3 and I'm the third-party payer, and I say 4 what the hell are you talking about? It 5 is -- you are paying -- you are paying, or 6 the retailer that is getting this drug, 7 what is being paid for this drug, what the 8 manufacturer is selling it for is 9 10 cents, and you are making me pay 10 90 cents? That would -- that would allow 11 for real pressure, informed pressure, to 12 push the basis of that reimbursement down. 13 Now to go back to the car 14 example that we started with yesterday, we 15 talked about sticker prices and list 16 prices, and we talked about a Toyota, and 17 we said, you know, look, the sticker price 18 would be about 23,000 or so, and maybe the 19 dealer -- and there is information that 20 would suggest that the dealer acquisition 21 cost is about 18,000, say 20 percent below 22 in relationship with WAC and AWP, sticker</p>

46 (Pages 498 to 501)

<p style="text-align: right;">498</p> <p>1 price and dealer acquisition cost.</p> <p>2 THE WITNESS: Do we need to take</p> <p>3 a break?</p> <p>4 MR. EDWARDS: I have no idea</p> <p>5 what is going on.</p> <p>6 (Pause.)</p> <p>7 A. Now if my information --</p> <p>8 MR. EDWARDS: I think the record</p> <p>9 should reflect that there was some</p> <p>10 activity in the room, and so there is --</p> <p>11 the witness said, "Do we need to take a</p> <p>12 break," and I said, "I have no idea what</p> <p>13 is going on," that is with respect to the</p> <p>14 activity in the room.</p> <p>15 THE WITNESS: I believe he was</p> <p>16 referring to my testimony, but.</p> <p>17 MR. EDWARDS: That, too.</p> <p>18 (Laughter.)</p> <p>19 A. So that I walk in. I am a young -- I am a</p> <p>20 young lady, and dealers want to take --</p> <p>21 are going to take advantage of me. They</p> <p>22 think they are going to out-negotiate me,</p>	<p style="text-align: right;">500</p> <p>1 from the sticker price is, well, it must</p> <p>2 be close to \$18,000. In that case, it is</p> <p>3 a sucker price. It is not a sticker</p> <p>4 price. And what is happening here is you</p> <p>5 need to know that information.</p> <p>6 And what I am saying is these</p> <p>7 people don't know that information. If</p> <p>8 they did know that information, and if I</p> <p>9 knew that information negotiating a price,</p> <p>10 I would be able to use it to get a better</p> <p>11 reduction off of AWP for the drugs.</p> <p>12 When I am filling out the</p> <p>13 percentage -- when I am filling in this</p> <p>14 client proposal here, and I know what the</p> <p>15 ASP is, I'm going to say, "13 percent?</p> <p>16 Give me a break. I want 60 percent off of</p> <p>17 that AWP."</p> <p>18 MR. SOBOL: May the record</p> <p>19 reflect the exhibit you were referring to.</p> <p>20 THE WITNESS: I was referring to</p> <p>21 page 2067 of the ESI Pharmacy Benefit</p> <p>22 Program Pricing Proposal for client X date</p>
<p style="text-align: right;">499</p> <p>1 and I say, you know -- we're settling on</p> <p>2 price, and, you know, I offer a price, and</p> <p>3 again the guy says, "You are killing me.</p> <p>4 I can't cover my cost." And you have some</p> <p>5 idea that the dealer acquisition cost is</p> <p>6 18,000 or whatever, and you negotiate</p> <p>7 somewhere what your reimbursement to him</p> <p>8 is going to be. And this is not a</p> <p>9 reimbursement scheme. This is just in a</p> <p>10 normal market -- a reimbursement scheme,</p> <p>11 this is even more of a difficult issue,</p> <p>12 because the middle person is involved,</p> <p>13 but the point is you are able with that</p> <p>14 kind of understanding to come up and</p> <p>15 negotiate some price where a customer can</p> <p>16 benefit if there are changes in the</p> <p>17 sticker price or whatever.</p> <p>18 Now suppose alternatively you</p> <p>19 go, and the guy is selling Toyotas and</p> <p>20 Ugos, and he has the same sticker price on</p> <p>21 the Ugo, and the dealer acquisition cost</p> <p>22 is 5,000 for that, but your understanding</p>	<p style="text-align: right;">501</p> <p>1 X, Bates numbered range ESI 27700002066 to</p> <p>2 2077.</p> <p>3 BY MR. EDWARDS:</p> <p>4 Q. You say that one of the things that you're</p> <p>5 going to do is you're going to compare</p> <p>6 discounts below AWP that were negotiated</p> <p>7 during time periods that were affected by</p> <p>8 the alleged fraud with discounts below AWP</p> <p>9 that were negotiated during time periods</p> <p>10 not affected by the alleged fraud? Fair?</p> <p>11 MR. SOBOL: Objection. Asked</p> <p>12 and answered.</p> <p>13 A. It is unfair. I'm going to compare</p> <p>14 relationships between AWP and ASP, which</p> <p>15 is a sum of all price offsets prior to the</p> <p>16 alleged fraud and compare those that</p> <p>17 actually occurred during the fraud to</p> <p>18 those that either occurred prior to or</p> <p>19 occurred during the period of the alleged</p> <p>20 scheme but were drugs manufactured by</p> <p>21 nondefendants or were drugs manufactured</p> <p>22 by defendants that lawyers -- that counsel</p>

<p style="text-align: right;">502</p> <p>1 indicates to me were not subject to the</p> <p>2 scheme.</p> <p>3 Q. You say you are going to compare what</p> <p>4 happened during periods affected by the</p> <p>5 alleged fraud to what happened during</p> <p>6 periods that were not affected by the</p> <p>7 alleged fraud?</p> <p>8 A. I'm --</p> <p>9 Q. Is that fair?</p> <p>10 A. What is fair to say is I'm going to</p> <p>11 compare spreads and what happened to</p> <p>12 pricing during the periods of alleged</p> <p>13 fraud to yardsticks for what would have</p> <p>14 happened during the alleged fraudulent</p> <p>15 period absent the AWP scheme.</p> <p>16 Q. And what would your conclusion be if in</p> <p>17 comparing those two time periods you came</p> <p>18 across a particular drug for which the AWP</p> <p>19 was identical and the discount below AWP</p> <p>20 in the contract was identical?</p> <p>21 A. So you are -- to understand the question</p> <p>22 right now, the -- as I have looked at --</p>	<p style="text-align: right;">504</p> <p>1 relationship of the but-for AWP to that</p> <p>2 ASP, both the same ASP, for that NDC of</p> <p>3 that manufacturer, and so that the but-for</p> <p>4 is from period B; the actual is from</p> <p>5 period A, as you are saying the fraud, the</p> <p>6 subject of the fraud; and for that</p> <p>7 particular NDC, do we want to say in a</p> <p>8 particular year, in a particular quarter,</p> <p>9 or for the --</p> <p>10 Two things. If it turns out</p> <p>11 that the AWP is not inflated relative to</p> <p>12 what the but-for relationship should be,</p> <p>13 then the impact, the injury, and the</p> <p>14 damages -- not the impact -- the injury</p> <p>15 and damages flowing from the scheme for</p> <p>16 that NDC for that -- for that contract</p> <p>17 would be zero.</p> <p>18 However, I have seen -- the</p> <p>19 second important point is I have not seen</p> <p>20 -- I certainly haven't looked at all the</p> <p>21 contracts, but I have seen no contract to</p> <p>22 date where the AWP in the spread is broken</p>
<p style="text-align: right;">503</p> <p>1 and we're talking about contracts. I'm</p> <p>2 not sure which contract we are talking</p> <p>3 about. PBM contracts with third-party</p> <p>4 payers?</p> <p>5 Q. We can talk about PBM contracts. Just to</p> <p>6 simplify it, period A is the fraud period.</p> <p>7 Period B is the nonfraud period. And</p> <p>8 let's say we have got an AWP for a</p> <p>9 particular drug of \$100.</p> <p>10 A. And when you say AWP for a particular</p> <p>11 drug, you mean an NDC for that drug?</p> <p>12 Q. Sure. An NDC for that drug with a</p> <p>13 reported AWP of \$100 and in both cases the</p> <p>14 contract with the PBM calls for</p> <p>15 reimbursement at AWP minus 15 percent.</p> <p>16 What conclusion would you draw from that</p> <p>17 scenario?</p> <p>18 A. So to be, perfectly understand what you're</p> <p>19 asking, I'm looking at an actual spread,</p> <p>20 and from -- and that -- and in that actual</p> <p>21 spread involves both an AWP and an ASP,</p> <p>22 and I go to my yardstick, which is a</p>	<p style="text-align: right;">505</p> <p>1 out by NDC. It is just an aggregate over</p> <p>2 everything and all types of drugs, and I</p> <p>3 would need to take into account that fact.</p> <p>4 I mean your hypothetical is not -- is</p> <p>5 counter to the evidence to the way</p> <p>6 contracts are written.</p> <p>7 Q. Do you have any understanding of the</p> <p>8 extent to which RFPs are used in</p> <p>9 connection with the negotiation of</p> <p>10 contracts between payers and PBMs?</p> <p>11 A. I would assume that they -- if -- if they</p> <p>12 weren't used, they should be used.</p> <p>13 Q. And if they are used, does that have any</p> <p>14 impact on your opinion?</p> <p>15 MR. SOBOL: Objection.</p> <p>16 A. We're talking about events that have</p> <p>17 occurred over the past 15 years that have</p> <p>18 led to my conclusion about the</p> <p>19 corroboration of the allegations, and all</p> <p>20 of those negotiations in my understanding</p> <p>21 were subject to RFP -- well, a lot of them</p> <p>22 were subject to RFPs. Certainly large</p>

48 (Pages 506 to 509)

<p style="text-align: right;">506</p> <p>1 third-party payers doing due diligence</p> <p>2 would submit RFPs to a set of PBMs to get</p> <p>3 competitive bids --</p> <p>4 Q. We were talking --</p> <p>5 A. -- or what they felt were competitive</p> <p>6 bids.</p> <p>7 Q. We have been talking about rebates. Do</p> <p>8 you know whether manufacturers pay rebates</p> <p>9 on generics?</p> <p>10 A. It is my understanding --</p> <p>11 MR. SOBOL: Objection to form.</p> <p>12 A. It is my understanding that they don't in</p> <p>13 general.</p> <p>14 Q. And I believe you testified yesterday that</p> <p>15 generics are often priced under an MAC's</p> <p>16 price list or at U & C; is that correct?</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 You may answer.</p> <p>20 A. There is certainly the impetus on the part</p> <p>21 of federal groups with a federal upper</p> <p>22 limit and state MACs and PBM contracts to</p>	<p style="text-align: right;">508</p> <p>1 Schering-Plough Group based on contracts</p> <p>2 that expressly use AWP as a pricing</p> <p>3 standard. Is that correct?</p> <p>4 A. That is correct to the extent --</p> <p>5 Q. So the litmus test is contracts that</p> <p>6 expressly use AWP as a pricing standard?</p> <p>7 Correct?</p> <p>8 A. That's correct.</p> <p>9 Q. And so generics that are priced pursuant</p> <p>10 to an MAC list or U & C would not be part</p> <p>11 of the class here because MAC and</p> <p>12 U & C are not AWP? Correct?</p> <p>13 MR. SOBOL: Objection.</p> <p>14 Objection to the form.</p> <p>15 A. No. Incorrect.</p> <p>16 Q. So are you redefining the class here?</p> <p>17 A. No.</p> <p>18 Q. What is your understanding of the phrase</p> <p>19 "expressly use AWP as a pricing standard"?</p> <p>20 A. I was disagreeing with your statement that</p> <p>21 MAC and U & C are unrelated to AWP, not</p> <p>22 the statement of the class.</p>
<p style="text-align: right;">507</p> <p>1 identify a maximum allowable cost which is</p> <p>2 initiated at some point after a certain</p> <p>3 number of generics are available in the</p> <p>4 market.</p> <p>5 Q. Take a look at the class definition which</p> <p>6 you quote in paragraph 6 of your</p> <p>7 declaration, pages 4 and 5.</p> <p>8 (Witness complying.)</p> <p>9 Q. Do you have that in front of you?</p> <p>10 A. I do.</p> <p>11 Q. The second class is a third-party and</p> <p>12 co-payer class, and it refers to or it</p> <p>13 states that, "Included within the</p> <p>14 class" --</p> <p>15 MR. EDWARDS: I am sorry.</p> <p>16 Strike that.</p> <p>17 Q. The second class identified there is a</p> <p>18 third-party and co-payer class, and that</p> <p>19 class is defined as third-party payers who</p> <p>20 made reimbursements for any drug</p> <p>21 manufactured by AstraZeneca, the BMS</p> <p>22 Group, PBN, J & J, GSK, or the</p>	<p style="text-align: right;">509</p> <p>1 Q. Well, that wasn't my statement, though.</p> <p>2 My statement -- my question to you, sir,</p> <p>3 was isn't it the case that a contract that</p> <p>4 bases the pricing of generic drugs on MAC</p> <p>5 would not be a definition of a contract</p> <p>6 that expressly uses AWP?</p> <p>7 A. And I'm saying no to that statement, that</p> <p>8 -- and that's only if MAC itself is</p> <p>9 expressed orthogonally or irrelevantly or</p> <p>10 has no relationship to AWP, and that's not</p> <p>11 my understanding.</p> <p>12 Q. What if it does not have a consistent</p> <p>13 relationship to AWP?</p> <p>14 MR. SOBOL: Objection.</p> <p>15 Q. How are you going to deal with that?</p> <p>16 MR. SOBOL: Objection.</p> <p>17 A. I have no idea what you mean by "a</p> <p>18 consistent relationship."</p> <p>19 Q. Well, let's take a hypothetical here.</p> <p>20 Let's say you have got a drug for which</p> <p>21 the AWP is a dollar and the MAC is</p> <p>22 50 cents. Would you say that that drug</p>

<p style="text-align: right;">510</p> <p>1 has a relationship to AWP?</p> <p>2 A. I need more information than one -- one</p> <p>3 claim for one drug.</p> <p>4 Q. What information would you need?</p> <p>5 A. Well, let's -- let's turn, if we might,</p> <p>6 again to the ESI document last cited, the</p> <p>7 Pharmacy Benefit Program Pricing Proposal,</p> <p>8 Bates numbered ESI 2774444 -- I am sorry</p> <p>9 -- 00002066 to 2077, where ESI has done us</p> <p>10 the favor of defining what they mean by</p> <p>11 MAC, and they mean it to be the maximum</p> <p>12 price for generic drugs which is</p> <p>13 equivalent to -- not inconsistent or the</p> <p>14 terms you were using -- is equivalent to a</p> <p>15 discount off of generic AWP up to</p> <p>16 80 percent, with an average range of</p> <p>17 40 percent to 60 percent depending upon</p> <p>18 the client's actual generic drug mix.</p> <p>19 I see a definition of MAC for</p> <p>20 ESI, and I am -- it is my guess that the</p> <p>21 other contracts will have similar language</p> <p>22 that relates the MAC price to AWP. It is</p>	<p style="text-align: right;">512</p> <p>1 talking about, 40 to 80 percent, is an</p> <p>2 order of magnitude of two.</p> <p>3 The claims data will show me by</p> <p>4 third-party payer and by PBM what indeed</p> <p>5 that percentage is relevant -- relative to</p> <p>6 the AWP by NDC.</p> <p>7 Q. But you are going to have to consider the</p> <p>8 range in every case, and you are going to</p> <p>9 have to consider the client's generic drug</p> <p>10 mix in every case in order to determine</p> <p>11 what the impact of AWP is; isn't that</p> <p>12 true?</p> <p>13 MR. SOBOL: Objection.</p> <p>14 A. I am going to observe what the average</p> <p>15 spread is, and that will translate, as in</p> <p>16 my attachment F where I deal with just the</p> <p>17 X percent off of AWP, the extent to which</p> <p>18 there are variations from 80 percent to</p> <p>19 40 percent will reveal themselves very</p> <p>20 simply in the claims data and directly</p> <p>21 when that claims data is made available to</p> <p>22 me, and that will determine the quantum of</p>
<p style="text-align: right;">511</p> <p>1 equivalent to. It is not inconsistent</p> <p>2 with. And I will be able to observe</p> <p>3 actual payments for and reimbursements</p> <p>4 under MAC when there are enough generics</p> <p>5 on the market to see whether it was at</p> <p>6 50 percent or whatever it was. It will be</p> <p>7 in the claims data. So it certainly says</p> <p>8 it is equivalent to a generic off of AWP.</p> <p>9 So they would be in the class in my</p> <p>10 reading of the class definition.</p> <p>11 Q. Well, it says, "Equivalent to a discount</p> <p>12 off of generic AWP up to 80 percent with</p> <p>13 an average range of 40 to 60 percent</p> <p>14 depending upon the client's actual generic</p> <p>15 drug mix."</p> <p>16 That's a pretty big range, isn't</p> <p>17 it?</p> <p>18 A. The -- for the branded drugs we're talking</p> <p>19 about a range that is not listed in here</p> <p>20 but is listed elsewhere of 13 to 17 to</p> <p>21 20 percent. That's an order of magnitude</p> <p>22 of two. The order of magnitude we're</p>	<p style="text-align: right;">513</p> <p>1 damages to different groups at the claims</p> <p>2 administration phase. It is not going to</p> <p>3 affect -- it is going to have no relevance</p> <p>4 to a conclusion of impact and causation.</p> <p>5 It is going to have no relevance to the</p> <p>6 calculation of aggregate damages. It will</p> <p>7 come to bear at the allocation of damages</p> <p>8 of how aggressively different groups had</p> <p>9 negotiated those discounts.</p> <p>10 Q. What are you going to do if it turns out</p> <p>11 that the MAC price is below ASP? If the</p> <p>12 MAC price is below ASP, has that customer</p> <p>13 been injured?</p> <p>14 A. If the customer has -- the injury occurs</p> <p>15 as the result of reimbursement under a</p> <p>16 reimbursement scheme, and if that customer</p> <p>17 paid more than he should have paid based</p> <p>18 on the formulas for reimbursement for that</p> <p>19 customer, then there will be injury. If</p> <p>20 it turns out that it is zero or -- then</p> <p>21 there be the measure of injury will be</p> <p>22 zero.</p>

50 (Pages 514 to 517)

<p style="text-align: right;">514</p> <p>1 THE WITNESS: Can I just 2 interrupt you for one second? Please 3 let's not go to lunch or to the bathroom. 4 I just need some more water. 5 MR. EDWARDS: Okay. 6 THE WITNESS: You can even ask 7 it to me while I am moving. 8 (Pause.) 9 THE WITNESS: Thank you. 10 BY MR. EDWARDS: 11 Q. So under your theory, a class member can 12 suffer injury even if it pays ASP? 13 A. Under my -- what I have been asked to look 14 at is given the allegations and the 15 reimbursement mechanisms in place have 16 customers, have third-party payers, have 17 class members been overcharged in their 18 reimbursement, and that's what I am 19 focusing on. 20 Q. Can you answer my question yes or no? 21 MR. SOBOL: Objection. 22 A. I have told you what my -- what the --</p>	<p style="text-align: right;">516</p> <p>1 A. No. I am amused to find that all the 2 signatures are all by Dale Wolf, however. 3 It makes me very suspicious about the 4 whole document. He has got every title in 5 the company. 6 (Laughter.) 7 THE WITNESS: I am sorry. It is 8 getting late. 9 Q. I want to direct your attention to the 10 pages with Bates number 63 and 64. 11 (Witness complying.) 12 A. I am so directed. 13 Q. Do you see that there is a definition of 14 maximum reimbursable amount, or MRA, or 15 maximum allowable cost, or MAC, at the 16 bottom of the page there? 17 A. I do see that. 18 Q. And it says, "MRA or MAC shall mean the 19 maximum price for certain generic and 20 multisource brand prescription drugs 21 established by Caremark or Coventry as the 22 case may be from time to time using a</p>
<p style="text-align: right;">515</p> <p>1 what my methodology will do. 2 Q. And under your methodology, is it possible 3 for a customer who paid ASP to have 4 suffered injury? 5 A. I haven't addressed -- I have addressed 6 the issue of overcharges and 7 reimbursement. To the extent that there 8 is an occurrence as you have hypothesized 9 that occurs in the damage analysis, it 10 will be something that will -- I will need 11 to address in the allocation phase. 12 Q. Take a look at Exhibit 15, which we've put 13 in front of you. 14 (Witness complying.) 15 Q. For the record, it is a copy of a contract 16 between Coventry Healthcare and Caremark 17 dated July 12, 1999. The Bates numbers 18 are CBH 52 through 136. 19 (Pause.) 20 (The witness viewing Hartman 21 Exhibit No. 015.) 22 Q. Have you reviewed this contract before?</p>	<p style="text-align: right;">517</p> <p>1 variety of factors, including but not 2 limited to First Data Bank/Medispan's 3 published baseline price and the maximum 4 allowable cost determined by the Health 5 Care Financing Administration." 6 Now with respect to an MAC list 7 developed by Coventry, how are you going 8 to go about figuring out what the impact 9 of AWP may or may not have been on that 10 list? 11 MR. SOBOL: Objection to the 12 form. 13 You may answer. 14 A. I will need to clarify in my mind what 15 First Data Bank's definition of baseline 16 price is, which is my -- which it is my 17 guess is also formulaically related to WAC 18 or AWP, but I will have to ascertain that, 19 since what Data Bank -- what First Data 20 Bank generally gathers are those list 21 prices that are essentially tautologies. 22 So that would tell me that there is some</p>